IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 1ST MARCH 2007 / 10TH PHALGUNA 1928

CRL.A.No. 2041 of 2006(A)

SC.615/2001 of ADDL. SESSIONS COURT (FAST TRACK-I), TRIVANDRUM
CP.182/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, ATTINGAL
CRIME NO.16/2000 OF CHIRAYINKEEZHU EXCISE RANGE

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APPELLANT:

RAJAN,
S/O.KARUNAKARAN, C.NO.651,
CENTRAL PRISON,
TRIVANDRUM.

BY ADV. ADV.SABU GEORGE(STATE BRIEF)

RESPONDENTS:

THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HON'BLE HIGH COURT AT ERNAKULAM.

BY PUBLIC PROSECUTOR K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 1.3.2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V.RAMKUMAR, J.

Crl.A. 2041/2006

Dated this 1st day of March, 2007

JUDGMENT

In this appeal preferred from the Central Prison, Thiruvananthapuram, the appellant, who was the accused in Sessions Case No.615/2001 on the file of the Additional Sessions Court (Fast Track-I), Thiruvananthapuram, challenges the conviction entered and sentence passed against him by that Court for an offence punishable under Section 55(a) of the Abkari Act.

2. The case of the prosecution is that on 1.5.2000 at about 7.30 p.m on the Oorupoika-Muttukonam road in front of Bhagavathy Temple in Edakkode village the accused was found transporting 5.200 litres of illicit arrack in 52 green plastic covers each containing 100 ml and the accused had thereby committed an offence punishable under Section 8(2) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the Court below for an offence punishable under Section 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution examined three witnesses as Pws 1 to 3

and got marked five documents as Exts. P1 to P5 and two material objects as Mos 1 and 2 series.

4. After the close of the prosecution evidence the accused was questioned and Section 313(1)(b) of Cr.P.C with regard to the incriminating circumstances appeared against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the Court did not consider this as a fit case for recording an order of acquittal under Section 232 Cr.P.C, the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. But he did not adduce any defence evidence.

6. The learned Additional Sessions Judge after trial, as per judgment dated 1.6.2006 found the appellant guilty of the offence punishable under Section 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- (One Lakh Rupees), and on default to pay the fine, to suffer rigorous imprisonment for six months. It is the said judgment which is assailed in this appeal.

7. I heard Adv. Sabu George the learned counsel, who defended the appellant on State Brief and Sri.K.S.Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not.

The Point:-

9. PW1 is the independent witness to the search and seizure and who is also an attestor to Ext.P1 mahazar prepared by the detecting officer. Even though PW1 admitted his signature in Ext.P1 mahazar, he did not fully support the prosecution. PW2 is the Excise Preventive Officer, Chirayinkeezh, who detected the offence. PW3 is the Excise Inspector who registered the crime, conducted the investigation and laid the charge before the Court. Ext.P4 crime and occurrence report and Ext.P5, certificate of chemical analysis, were marked through him.

10. After an anxious consideration of the oral and documentary evidence in the case, I am not satisfied that the prosecution has proved the guilt of the accused beyond reasonable doubt.

11. PW2 is the Excise preventive officer who allegedly stumbled upon the accused on 1.5.2000 at 7.30 p.m while on patrol duty. PW2 claims to have found 52 green packets in MO1 black carry bag, held by the accused. Ext.P1 mahazar

recites that on getting suspicious PW2 questioned the accused regarding the contents of the packets and the accused confessed that they were containing arrack, the truth of which was confirmed by PW2, through smell and taste. But the prosecution can succeed in proving the accused guilty of the offence only after chemical analysis of the contents of the packets. PW2 did not take any sample from any of the 52 packets, allegedly seized by him from the accused. Going by the recitals in Ext.P1 mahazar, PW2 took all the 52 packets in MO1 black plastic carry bag and sealed before seizing the same under Ext.P1 mahazar. The Court is kept in the dark as to the date on which the properties were produced before the Court and their condition at the time of production. For reasons best known to the prosecution, the property list was not marked in the case. Therefore, this Court is unable to find out the date of production of the property before the Court and their condition at the time of production.

12. As mentioned earlier, PW2 had not drawn any sample from the 52 packets allegedly containing contraband arrack. Even though PW3, the Excise Inspector, would say that he had filed a forwarding note for sending samples from the 52 packets to the chemical examiner for analysis, no such

forwarding note or its office copy was marked. It is not known whether any sample was taken by the committal Magistrate namely J.F.C.M-I, Attingal, from the 52 packets, the production of which before the Court itself has not been proved. Without a forwarding note or a requisition by the Investigating Officer, there was no occasion or necessity for the Magistrate to take or despatch any sample for analysis. Ext.P5 certificate of chemical analysis dated 9.6.2000 refers to a letter dated 26.5.2000 from J.F.C.M-I, Attingal, which accompanied the sample containing 180 ml of a clear liquid which after analysis was found containing of 27.23% by volume of Ethyl Alcohol. There is absolutely no material before the Court to suggest as to whether any sample had been drawn by a member of the Court staff and whether the said sample was forwarded to the chemical examiner for analysis. Even assuming that a sample was taken and forwarded, we do not know the date on which the sample was taken or the person who had taken the sample. If two of the packets were emptied into bottle by way of sampling for the purpose of analysis, the Court would have expected that the sample would contain 200 ml. But admittedly the sample which was forwarded to the chemical examiner was 180 ml. The prosecution can succeed in a case

of this nature only if it is proved that the sample which was analysed by the chemical examiner was the very same sample taken from the bulk quantity of the contraband liquor, allegedly carried by the accused and that too in a tamper proof condition. No such attempt was made by the prosecution. Apart from the absence of any contemporaneous record to indicate sampling and despatch of the sample to the chemical examiner, the thondy section clerk in charge of the properties, was also not cited or examined in the case as an additional witness. It is well settled that the prosecution can succeed in securing a conviction against the accused only if a sample taken from the contraband liquor allegedly carried by the accused and which had changed several hands had ultimately reached the hands of the chemical examiner in a tamper proof condition. See **State of Rajasthan v. Daulat Ram (AIR 1980 Supreme Court 1314) and Valsala v. State of Kerala (1993 (2) KLT 550).** The conviction entered and the sentence passed by the Court below, overlooking the above vital aspect of the matter, cannot, therefore, be sustained and are accordingly dislodged.

13. The appellant is found not guilty of the offence punishable under Section 55(a) of the Abkari Act and is

acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed in connection with any other case against him.

In the result, this Criminal Appeal is allowed as above.

V.RAMKUMAR,
JUDGE

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